**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **VEDA M. ODERO** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | |
| **SANDPIPER BAY HEALTH & RETIREMENT** | ) | Docket Nos. 1,032,650 |
| **CENTER and ANDOVER HEALTH CARE** | ) | & 1,032,501 |
| **CENTER, INC.** | ) | |
| Respondents | ) | |
| AND | ) | |
| | ) | |
| **TRAVELERS INDEMNITY COMPANY and** | ) | |
| **OLD REPUBLIC INSURANCE COMPANY** | ) | |
| Insurance Carriers | ) | |

## ORDER

Respondent Sandpiper Bay Health & Retirement Center (Sandpiper Bay) and its insurance carrier Travelers Indemnity Company (Travelers) appeal the November 20, 2007 preliminary hearing Order of Administrative Law Judge John D. Clark. Claimant was awarded medical treatment with Bradley W. Bruner, M.D., as the authorized treating physician and temporary total disability (TTD) compensation if claimant is taken off work. The Administrative Law Judge (ALJ) determined that claimant's current problems are the result of the injuries suffered by claimant on October 15, 2005, while working for Sandpiper Bay.

Claimant appeared by her attorney, E. L. Lee Kinch of Wichita, Kansas. Respondent Sandpiper Bay and its insurance carrier Travelers appeared by their attorney, Ali N. Marchant of Wichita, Kansas. Respondent Andover Health Care Center, Inc., and its insurance carrier Old Republic Insurance Company appeared by their attorney, Heather A. Howard of Kansas City, Missouri.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of the Preliminary

Hearing held November 20, 2007, with attachments; and the documents filed of record in this matter.

## ISSUE

Respondent Sandpiper Bay and its insurance company Travelers raise the issue of whether claimant's current need for medical treatment is the result of claimant's injuries suffered on October 15, 2005, while claimant worked for Sandpiper Bay or the result of an intervening injury suffered on November 4, 2006, while claimant worked for Andover Health Care Center, Inc. (Andover).

## FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant began working for Sandpiper Bay as a certified nurses aide (CNA) and a certified medical assistant (CMA) in 2001. On October 15, 2005, claimant slipped and fell when getting something for a patient of Sandpiper Bay. Claimant suffered a traumatic injury to her left knee and was referred for medical treatment. Claimant came under the care of orthopedic surgeon Daniel J. Prohaska, M.D. An MRI displayed a torn medial meniscus and degenerative changes in claimant's left knee. Dr. Prohaska recommended, and claimant underwent surgery on her left knee on February 13, 2006. The surgery consisted of a left knee arthroscopic partial lateral meniscectomy and an arthroscopic chondroplasty of the medial femoral condyle. After one week, claimant reported improved pain levels and the pre-surgery catching was gone. By April 4, 2006, claimant was determined to be at maximum medical improvement (MMI). In his letter of May 2, 2006, Dr. Prohaska rated claimant at 2 percent to the lower extremity pursuant to the fourth edition of the AMA *Guides*.[1] This rating covered only the meniscus tear and not the preexisting chondromalacia. Claimant was returned to her regular duties without restrictions. It is noted that, while claimant's pain was greatly improved, it was not entirely gone. Claimant was to return to Dr. Prohaska as her symptoms warranted.

Claimant did return to Dr. Prohaska for added treatment on June 20, 2006, with complaints of swelling, pain and stiffness in the knee. Claimant's knee was injected with Xylocaine, Marcaine and Celestone. Claimant was then returned to work, again without restriction. Claimant was told the effects of the injection would last for a period of months.

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Two to three months after the injection, claimant began experiencing increased pain, swelling and tightness in the knee. She contacted her workers compensation adjuster and requested the opportunity to return to Dr. Prohaska, but that request was refused.

On March 26, 2006, claimant changed jobs and was performing the same CNA and CMA duties for Andover that she had originally performed for Sandpiper Bay. Claimant continued to experience pain and swelling in her knee, even after this job change.

On November 4, 2006, claimant sat at a desk because her knee was bothering her. When she got up from the desk, she tripped over a phone cord and her knee bent backwards. Claimant was taken to a hospital emergency room and later referred to Kenneth A. Jansson, M.D., for an orthopedic consultation. Claimant underwent another MRI which was interpreted as showing a tear of the posterior portion of the lateral meniscus extending to the inferior surface and central portion.[2]

Dr. Jansson noted that claimant had never really experienced complete relief after her surgery. Claimant did feel better after the injection, but that relief was only temporary. Dr. Jansson determined that claimant's injury on November 4, 2006, was not a new injury. Her ongoing symptoms were related to her first work injury in 2005. Dr. Jansson, in his letter of April 2, 2007, stated that claimant had not suffered a new injury. Her problems were a continuation of her meniscus degeneration from the first episode.[3]

Claimant was returned to Dr. Prohaska for a follow-up evaluation on April 3, 2007. Dr. Prohaska, in his letter of April 3, 2007, stated that claimant had aggravated her preexisting osteoarthritis in her knee. He did not believe a new significant injury had been sustained.[4]

## PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[5]

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[2] P.H. Trans., Cl. Ex. 4.

[3] P.H. Trans., Cl. Ex. 1.

[4] P.H. Trans., Cl. Ex. 1.

[5] K.S.A. 44-501 and K.S.A. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[6]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[7]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[8]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[9]

In *Gillig,*[10] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

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[6] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[7] K.S.A. 44-501(a).

[8] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[9] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[10] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

In *Jackson*,[11] the Court held that in workers' compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.

However, the Kansas Supreme Court, in *Stockman,*[12] stated:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, the claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Graber*,[13] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

In *Logsdon*,[14] the Kansas Court of Appeals stated:

> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

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[11] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[12] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P. 2d 697 (1973); *see also Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

[13] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[14] *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, Syl. ¶ 3, 128 P.3d 430 (2006).

Claimant suffered an injury which arose out of and in the course of her employment with respondent Sandpiper Bay for which she was treated and returned to work. However, from the evidence in this record, it appears that claimant did not fully heal from that injury. Claimant sought added treatment in the form of injections, which provided only temporary aid in relieving her symptoms. At the time of the second incident on November 4, 2006, claimant was requesting a follow-up with Dr. Prohaska, a request that was denied by Sandpiper Bay's insurance company. It is clear the effects of the original injury remained.

The injury suffered on November 4, 2006, was not as severe, nor as debilitating as the original injury. Both Dr. Prohaska and Dr. Jansson determined that there was no second injury, but rather a continuation of the original injury and the original osteoarthritis. The ALJ agreed, finding claimant's problems were related to the original injury with Sandpiper Bay. This Board Member agrees with that finding. The Order granting claimant medical treatment, with Sandpiper Bay and its insurance company, Travelers, liable, should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[15] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

## CONCLUSIONS

Claimant suffered an accidental injury on October 15, 2005, for which she was provided medical treatment. The incident on November 4, 2006, was not a new injury. Claimant's need for medical treatment is a continuance of the original injury and not due to a new injury. Therefore, the Order of the ALJ granting medical treatment at the expense of Sandpiper Bay and its insurance company, Travelers, should be affirmed.

## DECISION

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge John D. Clark dated November 20, 2007, should be, and is hereby, affirmed.

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[15] K.S.A. 44-534a.

**IT IS SO ORDERED.**

Dated this ____ day of March, 2008.

HONORABLE GARY M. KORTE

c: E. L. Lee Kinch, Attorney for Claimant
Ali N. Marchant, Attorney for Respondent Sandpiper and its Insurance Carrier Travelers Indemnity Company
Heather A. Howard, Attorney for Respondent Andover and its Insurance Carrier Old Republic Insurance Company
John D. Clark, Administrative Law Judge